No. 3811

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

W. EVERETT, JOHN R. SORENSEN, H. HANSEN, B. JACOBSON, A. G. LARSEN, I. C. SORENSEN, P. HANAN, EARL SIMMONS, WALTER STARKEY, DONALD SMITH, GEORGE CORRON, ALEXANDER EASTGATE, W. MURPHY, J. AMUNDSON, GEORGE J. SMITH, JAMES RAY, E. GAUPHOLM, G. H. BEAUCHAMP, FRANK HOMAN, O. F. BOSTRONN, L. E. OBLOM and P. SOGNEFEST,

Appellants,

vs.

THE UNITED STATES OF AMERICA AND THE UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, a corporation,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION, SITTING IN ADMIRALTY.

HON. JEREMIAH NETERER, Judge

BRIEF OF APPELLANTS

THOS. P. REVELLE, United States Attorney,
JOHN A. FRATER, Asst. United States Attorney,
MacCORMAC SNOW,
Proctors for Appellees.

501 Platt Building,
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INDEX

PAGE

Annett vs. Carstairs, 3 Camp. 345 18
Aspinwall vs. Bartlett, 8 Mass. 483 13
Astoria Marine Iron Works vs. E. F. C., 270 Fed. 635 21
Bramen, The, 4 F. C. 10 18
Bronde vs. Haven, 4 F. C. 211 13
Brooks vs. Dorr, 2 Mass. 38, 45 13
Champlain vs. Butler, 18 Johns. 169 18
Corpus Juris, Vol. 2 page 461, Secs. 70-72 9
Cyc, Vol. 35 page 1230 17
Davidson vs. Baldwin, 79 Fed. 97 18
Dickey vs. Farinault, 11 L. C. R. 150 18
Giles vs. Vigereaux, 35 Me. 300 16
General McPherson, The, 100 Fed. 863 15
Goodridge vs. Lord, 10 Mass. 483 15
Harding vs. Souther, 12 Cush. 307, 315 16
Hussey vs. Allen, 6 Mass. 162 14
Kenneway vs. The Wickford, 14 F. C. 330 18
Lamb, The L. L., 31 Fed. 32 16
Leary vs. U. S., 14 Wallace, 607, 610 11
Marcardier vs. Chesapeake Ins. Co., 8 Cranch 39, 49 11
Morgan's Assignees vs. Shinn, 82 U. S. 105, 110 17
Reed vs. U. S., 11 Wallace 591 12
Revised Statutes, Sections 4525 and 4612 18
Russell vs. Racket, 46 Fed. 200 16
Shaw vs. U. S., 93 U. S. 235 12
Sheppard vs. Taylor, 5 Peters 675, 706 13

INDEX

PAGE

Sheriffs vs. Pugh, 22 Wis. 267 16
Skolfield vs. Potter, 22 F. C. 299 16
Sloan Shipyards Corp. vs. E. F. C., 268 Fed. 624 21
Suits in Admiralty Act (1920 Sup. 2nd Ed. F. S. A. p. 253) .. 21
Thorp vs. Hammond, 79 U. S. 408, 416 17
Tucker vs. Buffington, 15 Mass. 477 18
U. S. vs. Shay, 152 U. S. 178 12
U. S. vs. Hvoslef, 237 U. S. 16 12
Webb vs. Peirce, 29 F. C. 501 16

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STATEMENT OF THE CASE

The hull of the *Agron* was built for the United States, represented by the Shipping Board and the

Fleet Corporation and conveyed by the builder to the United States by bill of sale of June 19, 1919. (Agreed Statement, Article I, Apostles, page 8.)

March 5, 1920, this hull was agreed to be sold to National Oil Co. under a contract by which the United State retained title and National Oil Co. took possession of the vessel and agreed to complete her, and to give a mortgage back for the amount of the unpaid purchase price. (Agreed Statement, Article II.) The invoice and sales receipt are confirmatory of conditions of the contract. The acceptance shows the vessel to have been delivered to National Oil Co. June 4, 1920. The contract was not recorded. The mortgage was never executed. (Agreed Statement, Article III.)

National Oil Co. having completed and outfitted the vessel, turned her over to National Oil Transport Co. for operation. National Oil Transport Co. is an operating company for National Oil Co. which owns the stock therein. (Stipulation, Apostles, page 15.) Mr. Matthew testified that National Oil Transport Co. is a subsidiary of National Oil Co. and that after the execution of his contract, he received correspondence about it sometimes from one company and sometimes from the other. (Apostles, page 50.)

May 25, 1920, National Oil Transport Co. employed Universal Shipping & Trading Co. of Seattle as managing agent for the vessel. (Apostles page 50 and Respondent's Exhibit A, together with contract attached.) Prior to June 4, 1921, Universal Shipping & Trading Co., as such agent, employed respondent Tory Hedemark as Master. (Findings of Fact, Article XXIII. Apostles page 31.)

June 7, 1920, the Agron was registered in the name of the United States, represented by the Shipping Board. (Agreed Statement, Article IV and Exhibit.) On the same day the Ship's Articles were signed. (Agreed Statement, Article V and Exhibit.)

Libelants did not know that the vessel was registered in the name of the United States, but knew she was of a type built for the United States. (Findings of Fact, Article XXIV.) Judge Neterer found that no representations were made to the libelants as to the ownership of the vessel. (Opinion.) There were no contractural relations between the United States and the National Oil Transport Co. and/or Universal Shipping and Trading Co. (Findings of Fact, Article XXIV.)

The *Agron* commenced the voyage in question

in June, 1920, and throughout the voyage was managed by the Universal Company. (Matthew's Testimony.) During the voyage, the Master appeased the libelants in their demand for advances by showing them the certificate of the registry of the vessel. (Findings, Article XXV.) She arrived at the Canal Zone January 22, 1921, under tow of the Lake Fambush, a Shipping Board vessel, whose Master thereupon libeled her for salvage in the District Court of the United States for the Canal Zone. Libelants intervened for their wages and were granted a decree. The vessel was sold under this decree and the proceeds distributed among libelants. (Agreed Statement, Article VI and Exhibit.)

Libelants returned to Seattle and brought the present suit against the United States, the Emergency Fleet Corporation and Captain Hedemark. Judge Neterer held them entitled to recover from Captain Hedemark the amounts set forth in the decree, aggregating some fourteen thousand dollars, being the balance of wages and expenses due them after deducting the amounts received by them under the Panama decree. The libels were dismissed as to these respondents. (Findings of Fact and Decree.)

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ARGUMENT

Two defenses were made at the trial by respondents, United States and the Emergency Fleet Corporation:

First: That libelants cannot recover from them, there being no privity of contract. And,

Second: That libelants cannot maintain this suit against them under the Suits in Admiralty Act of March 9, 1920, and, therefore, not at all.

The District Court passed on the first point favorably to the contentions of these respondents and did not touch upon the second. Both defenses will be argued in this brief.

NO PRIVITY OF CONTRACT

There can be no liability for wages without a contract of employment. Libelants having the burden of proof, have failed to show any contractural relations between themselves and the United States or its representatives. Indeed, respondents have affirmatively shown that no such contract relations existed. The Shipping Board did not control the vessel after the contract of March 5, 1920. By virtue of this contract National Oil Co. took possession and its subsidiary and operating company, National

Oil Transport Co. took charge of the operation and entered into a managing agency contract with the Universal Shipping & Trading Co. The Universal Co. appointed the Master. The ship's articles were signed by the Master and the sailors, the former signing as the agent of National Oil Transport Co.

This company was the principal in the transaction. One test of the whole question of liability is this: Is the National Oil Transport Co. liable for the wages in question? If so, the United States and the Fleet Corporation are not liable. There can be but one principal.

The only ground on which the United States and its representatives are sought to be held is that the vessel was at the time of the voyage registered in the name of the United States. If we understand counsel correctly, he contends that the act of registering the vessel constituted an appointment of Tory Hedemark as Captain by the United States; or if this theory is incorrect, that the act of registering the vessel estops the United States from denying that the Captain is its agent.

The Court's attention is invited to the documents constituting this registration. The first of these is the affidavit of H. R. Bowen, Executive Assistant, Division of Supply & Sales in which he

makes oath respecting the *Agron* that "said vessel is wholly the property of the United States of America represented by the United States Shipping Board, Seattle, Washington * * * and that the present Master ..... is a citizen of the United States, having been born therein." The next document is the Master's oath in which the respondent, Tory Hedemark, describing himself as Master of the *Agron,* swears that he is a citizen of the United States, having been born in Norway and naturalized in the State of Washington. These two oaths having been made, the certificate of registration issued wherein it was certified that H. R. Bowen "having taken and subscribed an oath required by law and having sworn that the United States represented by the United States Shipping Board is the only owner of the vessel called the *Agron* of Seattle, whereof Tory Hedemark is Master, and is a citizen of the United States * * * said vessel has been duly registered at this port."

It would do violence to the language used in Mr. Bowen's oath to treat it as a power of attorney constituting Tory Hedemark, an agent of the United States. Captain Hedemark's name does not appear in Mr. Bowen's affidavit. The fact that it seems to have been omitted through inadvertance, does not

alter the case. If it were inserted in the appropriate blank space, this insertion would not be effective to make the United States responsible for the acts done by Hedemark as Master of the vessel. It is clear that the purpose of the insertion of the Master's name in the oath of registry is to establish of record the legal requirement that the Master be an American citizen. Accordingly we insist that there was no actual employment of Captain Hedemark by the Shipping Board and no act was done by the Board which could be construed as such employment.

Nor are these respondents, as we contend, estopped to deny their employment of Captain Hedemark. It does not appear in the record that libelants investigated the registry of the vessel before or at the time of signing on. In fact the contrary was found by the Court. They made no inquiries at the Custom House and did not know that the vessel belonged to the Shipping Board, although they did know she was of a type built for the Shipping Board. The record shows that they did not investigate the registry of the vessel until the certificate was shown to them by the Captain in South American waters in order to make them stay on the job. It cannot be said that they then remained on the

vessel because of the fact disclosed by the registry certificate. They stayed because of their contract obligation with National Oil Transport Co. In other words, the articles had not yet expired.

If the libelants had known at the time of signing on that the vessel was registered in the name of the United States, the case would not be altered. The vessel was then in the hands and under the control of the National Oil Transport Co. as owner *pro hac vice*. The contract of employment was with the National Oil Transport Co. Libelants contracted with this company as principal and looked to it for the payment of their wages, reserving, of course, their remedies against the Master and the vessel.

If libelants rely upon estoppel *in pais,* they must show:

1. Representations made by the United States to libelants with the intent that they should be acted on, or with reasonable anticipation that they might be acted on.

2. Reliance on these representations by libelants in good faith and with reasonable diligence.

3. A change of position by reason thereof.

2 C. J. 461, Secs. 70-72.

Libelants have failed in all three respects. They

have not shown that the Shipping Board caused this vessel to be registered in the name of the United States in order to induce them to sign the articles, or with the reasonable anticipation that such registrations would induce them to sign. The record shows affirmatively that they did not sign the articles in reliance on the registry, nor is there evidence that they would not have signed on had the vessel been otherwise registered.

But we believe proctor for libelants charges that an estoppel exists by the record. It is conceded that on account of the record made in the Custom House at Seattle, these respondents are precluded from denying that the *Agron* was registered in the name of the United States. They are not, however, precluded from denying that the United States employed Captain Hedemark and that a contract of employment existed between libelants and the United States. The authorities hereafter cited are conclusive on this point.

OWNER PRO HAC VICE LIABLE FOR VESSEL'S EXPENSES

It has long been held that where the general owner of a vessel places her in the exclusive possession and control of another, that other person be-

comes the owner *pro hac vice* with respect to liability for wages and other expenses. Mr. Justice Story has defined the degree of control by the owner for the voyage or the owner *pro hac vice* to render him so liable.

Marcardier vs. Chesapeake Ins. Co., 8 Cranch 39, 49.

"A person may be owner for the voyage, who, by a contract with the general owner, hires the ship for the voyage, and has the exclusive possession, command and navigation of the ship. Such is understoon to have been the case of *Vallejo vs. Wheeler,* Cowp. 143. But where the general owner retains the possession, command and navigation of the ship, and contracts to carry a cargo on freight for the voyage, the charter party is considered as a mere affreightment sounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership; such was the case of *Hooe & Co. vs. Groverman* in this court, 1 Cr. 214. In the first case, the general freighter is responsible for the conduct of the master and mariners during the voyage; in the latter case, the responsibility rests on the general owner."

Leary vs. U. S., 14 Wallace, 607, 610.

Mr. Justice Field said in this case:

"There is no doubt that under some forms of a charter party the charterer becomes the owner of the vessel chartered for the voyage or service stipulated, and consequently becomes subject to the duties and responsibilities of

> ownership. * * * If the charter-party let the entire vessel to the charterer with a transfer to him of its command and possession and consequent control over its navigation, he will generally be considered as owner for the voyage or service stipulated. But, on the other hand, if the charter-party let only the use of the vessel, the owner at the same time retaining its command and possession, and control over its navigation, the charterer is regarded as a mere contractor for a designated service, and the duties and responsibilities of the owner are not changed. In the first case the charter-party is a contract for the lease of the vessel; in the other it is a contract for a special service to be rendered by the owner of the vessel."

These distinctions have been approved in numerous cases including the following:

> *Reed vs. U. S.,* 11 Wallace 591.
> *Shaw vs. U. S.,* 93 U. S. 235.
> *U. S. vs. Shay,* 152 U. S. 178.
> *U. S. vs. Hvoslef,* 237 U. S. 16.

It is confidently asserted that the *Agron* was for the voyage in question in the hands of National Oil Transport Co. as owner *pro hac vice* and that consequently the United States is not liable on the ship's articles. No cases have been found applying this doctrine under circumstances exactly like the case at bar, but the analogies are close.

In all of the cases to be cited, the question of liability for wages is made to depend on the contract

of employment. Where the contract of employment is with the owner *pro hac vice,* he is held liable for wages, and not the general owner.

FORMER OWNER NOT LIABLE AFTER VESSEL CHANGES HANDS

It is, of course, true that the owner of a vessel cannot escape liability for wages by transferring title while ship's articles are in force. If this were possible, he could avoid paying deficits by selling the ship to a beggar.

Sheppard vs. Taylor, 5 Peters 675, 706.
Bronde vs. Haven, 4 F. C. 211.

Nor can the owner avoid liability for pending wages by abandoning to insurers.

Brooks vs. Dorr, 2 Mass. 38, 45.

However, where the owners sell a vessel and subsequently ship's articles are entered into, they are not liable for wages even though the vessel is still documented in their names.

Aspinwall vs. Bartlet, 8 Mass. 483.

This case is nearly on all fours with the case at bar. Bartlet was the owner. The Master sold the ship in London but not being authorized to execute a bill of sale, he accepted the purchase price, exe-

cuted a time charter to the purchasers, and retired from the operation of the ship. Later plaintiff's testator signed articles. It was held that plaintiff could not recover the wages thus incurred from Bartlet.

Hussey vs. Allen, 6 Mass. 162.

Defendants owned a ship and sold her during a voyage. A month after the sale and during the same voyage, plaintiff furnished supplies for her at the request of the Master in a foreign port. At this time it was not known to plaintiff or the Master that the sale of the vessel had been made. Plaintiff brought an action at law against the former owners. The court said:

> "And it is our opinion that the original owners are not liable to pay for any supplies furnished for the vessel, after they have sold all their interest in the vessel, although neither the master, nor the merchant furnishing the supplies, has any knowledge of the sale. The obligation, imposed on owners of vessels abroad, to pay for the necessary supplies furnished to the master, is founded on the principle, that the master is for this purpose their agent, and is authorized to bind them in this case; because the supplies are for their use and benefit, and without which their vessel cannot proceed on her destined voyage. But when the owners have alienated all their interest in the vessel, the master ceases to be their agent, and the supplies are not furnished for their use."

Proctor for libelants suggests that the *Agron* may have been in the tortuous possession of National Oil Transport Co. If so, the principle is the same.

The General McPherson, 100 Fed. 863.

This vessel sailed to Alaskan waters where the Captain converted vessel and cargo to his own use. One Poole who had shipped as supercargo now became cook under a written agreement for $90.00 per month wages. On his return he libeled the vessel for wages as cook. He was not permitted to recover.

OWNER PRO HAC VICE UNDER CHARTER PARTY LIABLE FOR WAGES

Applying Mr. Justice Story's doctrine of the *Marcardier* case, where a charter party gives to the charterer the exclusive possession, command and navigation of the ship, he and not the general owner is liable to the seamen for wages. This is plainly on the ground that the contract of employment is with him and not with the general owner.

Goodridge vs. Lord, 10 Mass. 483.

The charterers in this case were held to be the owners *pro hac vice.* They placed funds in the hands

of the Master to pay wages but were already indebted to the Master in an amount equal to this sum. The Master retained the funds. The sailors libeled the ship and the owners were required to pay the wages to release her. It was held that the owners could recover from the charterers. The court said:

> "From the facts stated in this case, it appears that the defendant, as master of the vessel, was liable to the seamen for their wages; and that the plaintiffs were not liable, Marston and Burbank being substituted as owners for that voyage by the charter party, and having stipulated to pay all the expenses of victualling and manning the vessel."

In the following cases the owner *pro hac vice* was held liable for wages, the Master being held to have been his agent in executing the ship's articles:

Webb vs. Peirce, 29 F. C. 501.
The L. L. Lamb, 31 Fed. 32.
Giles vs. Vigereaux, 35 Me. 300.

In the cases which follow, it was held that the charterer was not given the exclusive possession, command and navigation of the vessel and, therefore, was not the owner *pro hac vice.*

Skolfield vs. Potter, 22 F. C. 299.
Harding vs. Souther, 12 Cush. 307, 315.
Sheriffs vs. Pugh, 22 Wis. 267.
Russell vs. Racket, 46 Fed. 200.

The doctrine of the case of *Skolfield vs. Potter, supra,* to the effect that a Master operating a ship on shares and being in charge of the navigation thereof, is not an owner *pro hac vice* for the purpose of relieving the general owners from liability for wages is perhaps somewhat discredited by the collision case of

Thorp vs. Hammond, 79 U. S. 408, 416.

MORTGAGEE IN POSSESSION LIABLE FOR WAGES—MORTGAGEE OUT OF POSSESSION NOT LIABLE

It may be considered that the position of the Government with respect to the *Agron* is similar to that of a mortgagee out of possession, although the mortgage contemplated by the National Oil Co. contract was never actually given. Treated under this analogy, the case falls under the doctrine expressed by the editors of Cyc as follows (35 Cyc 1230):

> "A mortgagee in possession of a vessel is liable for seamen's wages, but not a mortgagee not in possession."

Morgan's Assignees vs. Shinn, 82 U. S. 105, 110.

Shinn advanced money to Kelly to purchase an interest in a vessel of which Morgan, Rhinehart &

Co. was ship's husband and representative of the other owners. Kelly gave Shinn an absolute bill of sale which, however, was shown by parol to have been intended as a mortgage. In the certificate of enrollment, Shinn was named as an owner. The vessel was burned. In course of liquidation, the assignee of the Morgan Co. brought his bill against Shinn to require him to contribute toward repairs and expenses of the vessel. The court said:

> "If then Shinn was only a mortgagee of an undivided interest in the vessel, as we think he was, he is under no obligations to contribute for repairs which he did not order. A mortgagee out of possession is not liable for repairs. The benefit of repairs enures primarily to the mortgagor. A mortgagee out of possession does not appoint the master, or the ship's agents. They do not act under authority from him, and he is not entitled to the freight earned. Nor does it make any difference though the vessel be registered in his name."

Davidson vs. Baldwin, 79 Fed. 97.
The Bramen, 4 F. C. 10.
Kenneway vs. The Wickford, 14 F. C. 330.
Champlain vs. Butler, 18 Johns. 169.
Tucker vs. Buffington, 15 Mass. 477.
Dickey vs. Farinault, 11 L. C. R. 150.
Annett vs. Carstairs, 3 Camp. 345.

REVISED STATUTES SECTIONS 4525 AND 4612

These sections are both parts of the Act of June

7, 1872, Chapter 322, 17 Stat. L. 268. Libelants contend that their right of recovery is permitted by Sec. 4525 and that under the definition of "owners" in Sec. 4612 they can recover against these respondents.

A cursory examination of Sec. 4525 discloses that it is intended only to abolish the ancient rule that freight is the mother of wages and is not otherwise intended to change the law. This section gives sailors a right to recover wages, although the voyage does not result profitably, but "subject to all other rules of law and conditions applicable to the case." An examination of the definition in Sec. 4612 discloses that its only intent is to make it clear that where a vessel has several owners, each one of these is designated wherever the word "owner" is used in the Act.

Taken together these sections cannot be construed to do away with the rules of maritime law concerning the respective liabilities of general owners and owner *pro hac vice*. Nor do these sections permit sailors to recover wages from any person with whom they have no contract of employment.

SUMMARY

Mr. Justice Story's definition in the *Marcardier*

case of an owner *pro hac vice* has always been followed. Under this definition National Oil Transport Co. was the owner *pro hac vice* of the *Agron* on the voyage in question. The Shipping Board finally parted with the vessel June 4, 1920. Thereafter until the judicial sale, the vessel was solely under the control, management, possession and navigation of National Oil Transport Co. Whether the United States with respect to its interest in the vessel is to considered a former owner, who has parted with his title, as in the *Aspinwall* case, or one who has let his vessel to a time charterer and owner *pro hac vice,* as in the *Goodridge* and *Giles* cases, or a mortgagee out of possession, as in the case of *Morgan's Assignees,* we admit a doubt. In any event there is no liability for these wages.

Running through all of these cases, is the proposition that there can be no liability for wages without a contract of employment made directly or by an agent. In the present case the evidence is unequivocal that the Captain was not the agent of the United States or the Fleet Corporation.

SUIT CANNOT BE MAINTAINED UNDER ACT OF MARCH 9, 1920

This is known as the Suits in Admiralty Act

(1920 Sup. 2nd Ed. F. S. A. p. 253). Section 1 forbids the arrest of vessels owned or operated by the Government. Section 2 provides in part as follows:

> "That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, *provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation.*"

Libelants rely on the Act of March 9, 1920 for their permission to sue the Government and the Fleet Corporation. The law in this circuit, we believe, requires them to have legislative permission in order to sue the Fleet Corporation as well as the Government.

> *Sloan Shipyards Corp. vs. E. F. C.,* 268 Fed. 624.
> *Astoria Marine Iron Works vs. E. F. C.,* 270 Fed. 635.

We contend that they are not permitted by this Act to maintain the present suit. The Court's attention is invited to the words of the Act as quoted above, which we have italicized, namely: "provided

that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation". The interest of the United States and the Fleet Corporation in the *Agron* has been one of manufacture rather than operation. The *Agron* was not employed as a merchant vessel by the United States or the Fleet Corporation at the time this suit was brought, or at the time the cause of action arose, or at any other time. The Government has never operated her and never possessed her as a completed vessel capable of operation.

The purpose of the statute is to permit the Government to be sued on causes of action arising through its operation of its Merchant Marine. The Act does not permit the United States to be sued on a cause growing out of operation of a vessel by the National Oil Co. or any other corporation not an agent of the United States, even though the hull of such vessel was originally built for the United States. The language of the Act herein emphasized seems to require that libelants must allege and prove that the *Agron* at the time the cause of action arose, or at the time suit was commenced, or at both of these times, was employed as a merchant vessel by the United States. The contrary appears in the

(1920 Sup. 2nd Ed. F. S. A. p. 253). Section 1 forbids the arrest of vessels owned or operated by the Government. Section 2 provides in part as follows:

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Libelants rely on the Act of March 9, 1920 for their permission to sue the Government and the Fleet Corporation. The law in this circuit, we believe, requires them to have legislative permission in order to sue the Fleet Corporation as well as the Government.

> *Sloan Shipyards Corp. vs. E. F. C.,* 268 Fed. 624.
> *Astoria Marine Iron Works vs. E. F. C.,* 270 Fed. 635.

We contend that they are not permitted by this Act to maintain the present suit. The Court's attention is invited to the words of the Act as quoted above, which we have italicized, namely: "provided

that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation". The interest of the United States and the Fleet Corporation in the *Agron* has been one of manufacture rather than operation. The *Agron* was not employed as a merchant vessel by the United States or the Fleet Corporation at the time this suit was brought, or at the time the cause of action arose, or at any other time. The Government has never operated her and never possessed her as a completed vessel capable of operation.

The purpose of the statute is to permit the Government to be sued on causes of action arising through its operation of its Merchant Marine. The Act does not permit the United States to be sued on a cause growing out of operation of a vessel by the National Oil Co. or any other corporation not an agent of the United States, even though the hull of such vessel was originally built for the United States. The language of the Act herein emphasized seems to require that libelants must allege and prove that the *Agron* at the time the cause of action arose, or at the time suit was commenced, or at both of these times, was employed as a merchant vessel by the United States. The contrary appears in the

record.

Respectfully submitted,

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